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IN THE

Supreme Court Of The United States

No. 80-1961

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

Ray Jackson Queen ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE FOURTH AMENDMENT EXCLUSIONARY RULE SHOULD BE APPLIED TO REVOCATION OF PROBATION PROCEEDINGS IN STATE COURTS.

II.

WHETHER THE DUE PROCESS REQUIREMENTS SET FORTH IN *MORRISSEY V. BREWER*, 408 U.S. 471, 92 S.CT. 2593, 33 L.ED.2d 484 (1972) AND *GAGNON V. SCARPELLI*, 411 U.S. 778, 93 S.CT. 1756, 36 L.ED.2d 656 (1973), SPECIFICALLY, THE REQUIREMENT OF MAKING WRITTEN FINDINGS OF THE EVIDENCE RELIED UPON AND REASONS FOR REVOCATION, SHOULD BE EXAMINED IN LIGHT OF *JACKSON V. VIRGINIA*, 443 U.S. 307, 99 S.CT. 2781, 61 L.ED.2d 560 (1979) REGARDING A REVIEW AND DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE.

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Ray Jackson Queen.....*Petitioner*

V.

State of Arkansas.....*Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 271 Ark. 929, 612 S.W.2d 95 (1981) and is reproduced in the appendix to the Petition for Writ of Certiorari at page A-1.

JURISDICTION

The petitioner relies upon 28 U.S.C. §1257 (3) as the basis of this Court's jurisdiction and facially the jurisdiction of this Court has been adequately presented based on the questions raised for review: the exclusionary rule set forth in the Fourth Amendment and the Fourteenth Amendment Due Process Clause of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petitioner has adequately set forth the constitutional provisions involved. The Arkansas state statute governing notice and hearings on revocation of suspension or probation, Ark. Stat. Ann. §41-1209 (Repl. 1977) is set out in respondent's Appendix "A".

STATEMENT OF THE CASE

On April 11, 1980, the State of Arkansas filed an Amended Petition to Revoke the Petitioner's suspended sentences alleging: on January 25, 1980, the Petitioner had been convicted in Municipal Court in Forth Smith, Arkansas of the offenses of driving while intoxicated and carrying a prohibited weapon; on February 21, 1980, the Petitioner has been arrested for the offenses of Public Drunk and Carrying a Prohibited Weapon, and had been in the presence of a known felon; and on April 9, 1980, the Petitioner committed the offense of Felon in Possession of a Firearm, Drunk and being in the presence of a convicted felon.

On April 21, 1980, a hearing was held in the Circuit Court of Sebastian County, Arkansas, on the State's Petition to Revoke. Witnesses called by the State included the following law enforcement officers: William Cooper, Rich Garrett, Cecil Marshall, Luther McGrew and Deputy Sheriff McAllister. The Petitioner did not testify nor were any witnesses called in his behalf.

On April 21, 1980, the Circuit Court of Sebastian County entered a written Order setting forth the offenses allegedly committed by the Petitioner as set forth in the State's Petition to Revoke and found that the Petitioner had violated the terms of his suspended sentences in two cases, case number 1564 and CR-75-264.

Except as otherwise indicated, the facts of the case are adequately set forth in the Petitioner's statement of the case.

SUMMARY OF RESPONDENT'S ARGUMENT

I. The respondent submits that the decision by the Arkansas Supreme Court in holding that the Fourth Amendment exclusionary rule does not apply to revocation

of probation cases is in line with the majority rule followed in other jurisdictions. The majority rule is not inconsistent with previous decisions by this Court evidencing a disinclination to expand the impact of the exclusionary rule.

II. Decisions in the Arkansas appellate courts regarding issues of due process in revocation of probation proceedings are not inconsistent with decisions in the United States Supreme Court. Ark. Stat. Ann. §41-1209 was enacted to extend to probation revocation proceedings the same due process requirements applicable in parole revocation proceedings as enunciated in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). The decisions of the Arkansas appellate courts reflect a rejection of the technical argument that a per se failure by the trial court to make written findings, absent a showing of resulting prejudice to a defendant, does not work a deprivation of fundamental fairness. There has been no showing that the petitioner was precluded from perfecting an intelligent appeal or that revocation of probation was not supported by the evidence.

REASONS FOR DENYING THE WRIT

I.

WHETHER THE FOURTH AMENDMENT EXCLUSIONARY RULE SHOULD BE APPLIED TO REVOCATION OF PROBATION PROCEEDINGS IN STATE COURTS.

The petitioner raises two questions which it is asserted require consideration on review. The respondent initially notes that in Rule 17 of the Rules of the Supreme Court a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Rule 17 (1) sets out

the general but not the limited considerations governing review of state court decisions as follows:

* * *

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The first question presented by the petitioner is whether the Fourth Amendment exclusionary rule should apply to revocation of probation proceedings.

In Appendix "D" of his petition, the petitioner sets forth his argument presented to the Arkansas Supreme Court that evidence was illegally seized and, therefore, should have been suppressed at the revocation of probation hearing. In deciding this issue against the petitioner, the Arkansas Supreme Court discussed the factual circumstances of the search and seizure and held:

> The seizure of these articles did not violate the constitutional prohibition against unreasonable search and seizure. The exclusionary rule, as it is applied in most cases, does not apply to every criminal proceeding. *United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975); *Harris v. State*, 270 Ark. 634, 606 S.W.2d 93 (Ark. App., 1980). We recently held that it does not apply to a revocation proceeding. *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981).

271 Ark. at 932.

Thus, contrary to the assertion by the petitioner, the Arkansas Supreme Court made a determination on appellate review that the items seized were not the fruits of an illegal search.

Moreover, the holding by the Arkansas Supreme Court that the exclusionary rule does not apply in revocation proceedings, citing *Harris v. State*, 270 Ark. 634, 606 S.W.2d 93 (Ark. App. 1980) and *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981) is not in conflict with decisions in other courts nor does it present a controversial issue which must be settled upon resolution by this Coiurt. In reaching a determination regarding the non-application of the exclusionary rule, both the Arkansas appellate courts have recognized that this is the majority rule followed in other jurisdictions. *Schneider v. State*, 269 Ark. 245, 599 S.W.2d 730 (1980), citing Annot. 77 ALR 3d 636, 30 ALR Fed. 824. It was further noted that this holding was consistent with the decisions of the United States Supreme Court and the Court's disinclination to extend the impact of the exclusionary rule. *Harris v. State*, 270 Ark. 634 (Ark. App. 1980); *Schneider v. State*, 269 Ark. 245, 599 S.W.2d 730 (1980), citing *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976); *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

The respondent submits that contrary to the allegations of the petitioner, there is no deep split among the various jurisdictions on this issue. As noted in Annot. 77 ALR 3d 636, 639, most courts have refused to extend the exclusionary rule to revocation proceedings. Neither do the cases cited by the petitioner in his petition bear out his argument regarding the number of jurisdictions that follow the majority rule.

For example, in *State v. Spratt*, 386 A.2d 1094 (R.I. 1978) the issue was squarely before the Rhode Island Supreme Court wherein the exclusionary rule was

determined inapplicable to revocation proceedings as being inconsistent with the purpose of non-admissibility of illegally seized evidence, *viz.*, to deter unconstitutional methods of law enforcement. The Rhode Island Supreme Court noted:

> The question is whether evidence obtained as the result of an illegal search and seizure may be used at a probation revocation hearing. Although we have not heretofore passed upon that question, courts elsewhere, without distinguishing between parole and probation revocation hearings, have almost unanimously ruled the evidence admissible. *United States v. Vandemark*, 522 F.2d 1019 (9th Cir. 1975); *United States v. Farmer*, 512 F.2d 160 (6th Cir.), *cert. denied*, 423 U.S. 987, 96 S.Ct. 397, 46 L.Ed.2d 305 (1975); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970); *In re Martinez*, 1 Cal.3d 641, 83 Cal. Rptr. 382, 463 P.2d 734, *cert. denied*, 400 U.S. 851, 91 S.Ct. 71, 27 L.Ed.2d 88 (1970); *People v. Atencio*, 186 Colo. 76, 525 P.2d 461 (1974); *People v. Dowery*, 20 Ill. App. 3d 738, 312 N.E.2d 682 (1974); *Dulin v. State*, Ind., 346 N.E.2d 746 (1976); *State v. Caron*, 334 A.2d 495 (Me. 1975); *State v. Kuhn*, 7 Wash. App. 190, 499 P.2d 49 (1972).

386 A.2d at 1094-1095.

Likewise, the same was held in *State v. Towle*, 609 P.2d 1097 (Ariz. App. 1980) where the rationale was expressed by the Court of Appeals of Arizona in terms of the proper function of the probation-parole system:

> The majority of courts hold that the exclusionary rule does not apply to parole and probation revocation proceedings. *U.S. v. Frederickson*, 581 F.2d 711 (8th Cir. 1978); *U.S. v. Winsett*, 518 F.2d 51 (9th Cir. 1975); *U.S. v. Farmer*, 512 F.2d 160 (6th

> Cir. 1975); *U.S. v. Brown*, 488 F.2d 94 (5th Cir. 1973); *U.S. v. Hill*, 447 F.2d 817 (7th Cir. 1971); *State v. Sears*, 553 P.2d 907 (Alaska 1976); *In re Martinez*, 1 Cal.3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970), cert. den. 400 U.S. 851, 91 S.Ct. 71, 27 L.Ed.2d 88; *People v. Atencio*, 525 P.2d 461 (Colo. 1974); *Croteau v. State*, 334 So.2d 577 (Fla. 1976); *People v. Dowery*, 62 Ill.2d 200, 340 N.E.2d 529 (1975); *Dulin v. State*, 346 N.E.2d 746 (Ind. App. 1976); *State v. Caron*, 334 A.2d 495 (Me. 1975); *State v. Thorsness*, 165 Mont. 321, 528 P.2d 692 (1974); *Commonwealth v. Davis*, 234 Pa. Super. 31, 336 A.2d 616 (1975); *State v. Spratt*, 386 A.2d 1094 (R.I. 1978). The rationale of the decisions is that since the exclusionary rule is operative in any event in all criminal prosecutions, the furtherance of its policy objectives achieved by extending the rule to parole or probation revocation hearings is insufficient to justify the concomitant impairment of the proper functioning of the probation-parole system. See also *State v. Robledo*, 116 Ariz. 346, 569 P.2d 288 (App. 1977).

609 P.2d at 1097-1098.

The majority rule was also followed in *Kinzer v. State*, 366 So.2d 874 (Fla. 1979), and *State v. Proctor*, 559 P.2d 1363 (Wash. App. 1977).

Some courts do apply the exclusionary rule in revocation proceedings where there is evidence of police harassment or misconduct, i.e., where police officers are aware of suspect's status as a probationer and evidence obtained in violation of the Fourth Amendment is excluded as a deterrent for police misconduct. See, e.g., *State v. Shirley*, 570 P.2d 1278 (Ariz. App. 1977); *Moore v. State*, 562 S.W.2d 484 (Tex. Crim. App. 1978); *United States ex rel. Lambardino v. Heyd*, 318 F. Supp. 648 (E.D. La. 1970) aff'd, 438 F.2d 1027 (5th Cir. 1970) *cert. denied* 404 U.S. 880, 92 S.Ct. 195, 30 L.Ed.2d 160 (1971).

The respondent also notes that the United States Supreme Court declined to review the question in *United States v. Farmer*, 512 F.2d 160 (6th Cir. 1975) *cert. denied*, 432 U.S. 987, 96 S.Ct. 397, 46 L.Ed.2d 305 (1975) and *In Re Martinez*, 463 P.2d 734 (Cal. App. 1970) *cert. denied* 400 U.S. 851, 91 S.Ct. 71, 27 L.Ed.2d 88 (1970).

No reason for granting review consistent with Rule 17 of this Court has been sufficiently presented by the petitioner. The respondent is only able to say with probable certainty that Georgia applies the Fourth Amendment exclusionary rule to revocation proceedings. *Adams v. State*, 264 S.E.2d 533 (Ga. App. 1980). The majority rule has been adopted by the Arkansas Supreme Court and its rationale thoroughly explored and found to be consistent with the decisions of the United States Supreme Court. A revocation hearing does not deprive a defendant of absolute liberty but only of conditional liberty dependent on the adherence to certain conditions. It is not a criminal prosecution and therefore all the rights that attach in prosecution do not equally apply in a revocation of probation proceeding. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). There is no issue presented which necessitates review and resolution by this Court.

II.

WHETHER THE DUE PROCESS REQUIREMENTS SET FORTH IN *MORRISSEY V. BREWER*, 408 U.S. 471, 92 S.CT. 2593, 33 L.ED.2D 484 (1972) AND *GAGNON V. SCARPELLI*, 411 U.S. 778, 93 S.CT. 1756, 36 L.ED.2d 656 (1973), SPECIFICALLY, THE REQUIREMENT OF MAKING WRITTEN FINDINGS OF THE EVIDENCE RELIED UPON AND REASONS FOR REVOCATION, SHOULD BE EXAMINED IN LIGHT OF *JACKSON V. VIRGINIA*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) REGARDING A REVIEW AND DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE?

The second question presented by the petitioner involves a due process argument regarding the duty of the trial court to make written findings when probation is revoked after a hearing. The petitioner asks this Court to consider this question in light of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) and require a determination that there was sufficient evidence on which a rational trier of fact could base a decision to revoke probation.

First, the respondent submits that the petitioner makes no argument that the decision by the Arkansas Supreme Court in affirming the revocation of probation is inconsistent with that of any other jurisdiction.

In accord with *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), Ark. Stat. Ann. §41-1209 (Repl. 1977) was enacted to extend to probation revocation proceedings the same due process requirements applicable in parole revocation proceedings. Ark. Stat. Ann. §41-1209 (2) provides that "If suspension or probation is revoked, the court shall prepare and furnish to the defendant a written statement of the evidence relied on and the reasons for revoking suspension or probation." As stated in *Gagnon v. Scarpelli*, supra, the requirements set forth therein and enacted at Ark. Stat. Ann. §41-1209, supra, "serve as substantial protection against ill-considered revocation . . . ." 411 U.S. at 786.

The petitioner couches his argument that review should be granted on this issue in terms that the per se failure of the trial court to provide written findings is an error of such fundamental magnitude that review should be granted by this Court for purposes of supervising the Arkansas state courts.

The respondent submits that the picture is not as bleak as that painted by the petitioner.

Both the Arkansas Supreme Court and the Court of Appeals have considered the responsibility of the trial court to furnish a written statement of the evidence relied upon and reasons for revocation in light of the failure to do so. In *Hawkins v. State*, 270 Ark. 1016, 607 S.W.2d 400 (Ark. App. 1980) the Court of Appeals determined that one reason for the requirement is so that the defendant can ascertain the precise basis of the trial court's decision so that an intelligent appeal can be perfected. However, where there has been "substantial compliance" with Ark. Stat. Ann. §41-1209 (2) or a failure to object and call the deficiency to the trial court's attention, the Arkansas appellate courts have not found reversible error in the absence of any resulting prejudice to the defendant. The decisions of the Arkansas Appellate Courts heretofore reflect a rejection of the technical argument that a per se failure to make written findings, without more, is sufficient to prejudice a defendant and deprive him of fundamental fairness. *Rutledge v. State*, 263 Ark. 300, 564 S.W.2d 511 (1978); *Hawkins v. State*, 270 Ark. 1016 (Ark. App. 1980); *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981). In other words, unless the appellant establishes on appeal that the trial court's failure resulted in prejudice to him, such as, precluding the appellant from perfecting an intelligent appeal, the error is harmless. It is further noted that in the three cases cited above, *Rutledge v. State, supra; Hawkins v. State, supra;* and *Lockett v. State, supra*, there was a review on appeal of the evidence which supported the decision to revoke probation.

In the context of the petitioner's argument regarding preservation of the issue by objection, the respondent notes that the spirit of *Morrissey v. Brewer, supra*, was not to "create an inflexible structure for parole revocation procedures." 408 U.S. at 490. The rule in the Arkansas courts of refusing to presume that error is prejudicial unless such is clearly established is not in contravention to the inflexible standard approach. By analogy, but without advancing the demand-waiver rule, the respondent notes

that this Court has previously held that a criminal defendant has some responsibility in asserting and preserving his constitutional rights, e.g. the right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

The petitioner asserts in his argument that he objected to the trial court's failure to furnish written findings, and cites pages 108-109 of the trial court record in support. The respondent submits that a review of the discussion therein reveals that the matter was not called to the attention of the trial court. (See Appendix "E") Furthermore, a Motion to Reduce Sentence and Notice of Appeal cannot seriously be considered as objections to the trial court's failure to furnish written findings. (R. 17, 18-19, See Appendix "C" & "D").

However, it is more important to note that although the petitioner's per se failure argument is in terms of preclusion of an intelligent appeal, no where was that issue in those terms raised on appeal to the Arkansas Supreme Court. Neither is it argued that the Arkansas Supreme Court affirmed the revocation of the petitioner's probation with blatant disregard of the appellant's inability to intelligently appeal his case. To the contrary, the Arkansas Supreme Court reviewed the evidence of misconduct: a conviction for driving while intoxicated, carrying a prohibited weapon, separate incident of driving while intoxicated and an attempt to elude police officers, and another incident of intoxication and disorderly conduct. This evidence was considered in light of the appellant's conditions of probation and it was determined that the trial court was not "clearly wrong in its findings." 271 Ark. at 932-933.

Furthermore, the written order entered at the trial court level reflects a recitation of the offenses committed by the petitioner as alleged in the State's petition to revoke. The trial court specifically found that "upon conclusion of

the testimony, the State proved by a preponderance of the evidence that the defendant, Ray Jackson Queen, violated the terms of his suspended sentence, as alleged by the State's petition to revoke . . . ." The order as entered by the Sebastian County Circuit Court is set forth at Appendix "B".

See, *Kartman v. Parratt*, 535 F.2d 450 (8th Cir. 1976) where the federal district court found that the purposes of written findings are to determine whether there is a factual basis for revocation and to protect the probationer from a second revocation proceeding based on the same offensive conduct.

Last, the respondent contends that *Jackson v. Virginia*, 443 U.S. 307, 97 S.Ct. 2781, 61 L.Ed.2d 560 (1979) should not, of necessity be extended to apply to revocation of probation proceedings. Revocation of probation lies within the sound discretion of the trial court and the decision to revoke must be supported by a preponderance of the evidence. *Pearson v. State*, 262 Ark. 513, 558 S.W.2d 149 (1977). In contrast *Jackson v. Virginia, supra*, established a necessary safeguard where a criminal conviction is collaterally attacked by use of the federal writ of habeas corpus and a challenge has been made to the sufficiency of the evidence to support the conviction. Federal review is sanctioned, where the issue is sufficiency of the evidence to sustain a criminal conviction, to determine that every element of a criminal offense has been proven beyond a reasonable doubt in situations where a defendant's absolute liberty has been removed. In contrast, revocation of probation removes conditional liberty and is not a criminal proceeding.

The issue of the sufficiency of the evidence to support the revocation of probation was raised by the petitioner on appeal and decided adversely to him by the Arkansas Supreme Court. 271 Ark. at 929, 932-933. He should not now

be permitted to raise the issue again *via* certiorari to this Court under the guise of state court failure to afford minimum standards of due process.

CONCLUSION

The petitioner has not demonstrated that the ruling of the Arkansas Supreme Court on the issue of exclusionary rule is in conflict with the majority rule followed by other jurisdictions. Rather, the Arkansas Court's refusal to expand the impact of the exclusionary rule to revocation of probation proceedings is in accordance with well established and well reasoned precedent.

The petitioner has likewise failed to establish that the minimum standards of due process applicable in a revocation of probation proceeding have not been afforded him. Rather, the ruling on that issue is in harmony with applicable decisions of this Court.

For these reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX "A"

ARKANSAS CRIMINAL CODE

41-1209. Notice and hearings on revocation of suspension or probation.—(1) A defendant arrested for violation of suspension or probation shall be entitled to a preliminary hearing to determine whether there is reasonable cause to believe that he has violated a condition of suspension or probation. Such hearing shall be conducted by a court having original jurisdiction to try criminal matters as soon as practicable after arrest and reasonably near the place of the alleged violation or arrest. The defendant shall be given prior notice of the time and place of the preliminary hearing, the purpose of the hearing, and the conditions of suspension or probation he is alleged to have violated. Except as provided in subsection (3), the defendant shall have the right to hear and controvert evidence against him and to offer evidence in his own behalf. If the hearing court finds that there is reasonable cause to believe that the defendant has violated a condition of suspension or probation, it shall order the defendant held for further revocation proceedings before the court that originally suspended imposition of sentence on defendant or placed him on probation. If the hearing court does not find such reasonable cause, it shall order the defendant released from custody, but such action shall not bar the court that suspended imposition of sentence on defendant or placed him on probation from holding a hearing on the alleged violation of suspension or probation or from ordering that the defendant appear before it. The hearing court shall prepare and furnish to the court that suspended imposition of sentence on defendant or placed him on probation a summary of the hearing, including the responses of the defendant and the substance of the documents and evidence given in support of revocation.

(2) A suspension or probation shall not be revoked except after a revocation hearing. Such hearing shall be

conducted by the court that suspended imposition of sentence on defendant or placed him on probation within a reasonable period of time, not to exceed 60 days, after the defendant's arrest. The defendant shall be given prior written notice of the time and place of the revocation hearing, the purpose of the hearing, and the condition of suspension or probation he is alleged to have violated. Except as provided in subsection (3), the defendant shall have the right to hear and controvert evidence against him, to offer evidence in his own defense, and to be represented by counsel. If suspension or probation is revoked, the court shall prepare and furnish to the defendant a written statement of the evidence relied on and the reasons for revoking suspension or probation.

(3) At a preliminary hearing pursuant to subsection (1) or a revocation hearing pursuant to subsection (2):

(a) the defendant shall have the right to confront and cross-examine adverse witnesses unless the court specifically finds good cause for not allowing confrontation; and

(b) the court may permit the introduction of any relevant evidence of the alleged violation, including letters, affidavits, and other documentary evidence, regardless of its admissibility under the rules governing the admission of evidence in criminal trials.

(4) A preliminary hearing pursuant to subsection (1) shall not be required if:

(a) the defendant waives a preliminary hearing; or

(b) the revocation is based on the defendant's commission of an offense for which he has been tried and found guilty in an independent criminal proceeding; or

(c) the revocation hearing pursuant to subsection (2) is held promptly after the arrest and reasonably near the place where the alleged violation occurred or where the defendant was arrested. [Acts 1975, No. 280, §1209, p. 500.]

APPENDIX "B"

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT

STATE OF ARKANSAS PLAINTIFF

V. NO. 1562, 1564, 1565, 75-83, 75-264

RAY JACKSON QUEEN DEFENDANT

ORDER

Now on this Twenty-first Day of April, 1980, comes on before the Court the Petition to Revoke the suspended sentence of the defendant, Ray Jackson Queen, appearing in person and by his attorney, John Settle, and the State being represented by J. Lamar Porter, Deputy Prosecuting Attorney, and the Court being sufficiently advised doth find:

1. That on February 13, 1970, defendant appeared in Open Court with his attorney, Doug Parker, and after being advised of his rights, pled guilty to the charge of Burglary of a Vending Machine in No. 1562, and two counts of Burglary in No. 1564 and 1565. Defendant was placed on five (5) years probation on all three counts. On July 24, 1974, hearing was held on defendant's petition to revoke and on July 29, 1974, judgment was entered setting aside probationary sentences in 1562, 1564 and 1565, and the Court sentenced defendant to ten (10) years in the Arkansas State Penitentiary with five (5) years suspended in 1562; ten

(10) years in the Arkansas State Penitentiary, all suspended, in 1564; and, ten (10) years in the Arkansas State Penitentiary, all suspended, in Case No. 1565, said sentences to run concurrently. On February 26, 1976, defendant pled guilty to charges of Assault With Intent to Kill in CR 75-264 and Forgery and Uttering in CR 75-83, and in the former case was placed on ten-(10)-year sentence with five (5) years suspended, to run consecutively with the sentence then being served in Case No. 1562; and in CR 75-83 was given a five (5) year sentence with three (3) years suspended, to run concurrently with CR 75-264 and consecutively with No. 1562.

2. That a Petition to Revoke defendant's suspended sentences was filed in the above case numbers, the State of Arkansas alleging that the defendant had committed the offenses of DWI, Carrying a Prohibited Weapon (Two Counts), Public Drunk, Associating with Known Felons, and Felon in Possession of a Firearm.

3. That on this date, defendant appeared in person and by his attorney, John Settle, and testimony was presented before the Court on the Petition to Revoke suspended sentences and upon conclusion of the testimony, the State proved by a preponderance of the evidence that the defendant, Ray Jackson Queen, violated the terms of his his suspended sentence, as alleged by the State's Petition to Revoke, and that the suspended sentences in Cases No. 1564 and CR 75-164 be set aside.

4. Defendant appeared in person and by his attorney, John Settle, and after being afforded the right of allocution, was sentenced in Open Court in accordance with this Order.

IT IS THEREFORE ORDERED AND DECREED that the suspended sentence in Case No. 1564 be set aside and defendant sentenced to ten (10) years in the Arkansas Department of Correction and that the suspended sentence in Case No. CR 75-264 be set aside and defendant be

sentenced to five (5) years in the Arkansas Department of Correction, to run concurrently with sentence in Case No. 1564.

/s/ John Holland
JOHN HOLLAND
CIRCUIT JUDGE

APPENDIX "C"

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT

STATE OF ARKANSAS PLAINTIFF

VS. NO. CR-1564

JACKIE QUEEN DEFENDANT

NOTICE OF APPEAL AND DESIGNATION OF RECORD

The defendant, Jackie Queen, hereby gives notice that he appeals the Judgment rendered herein on the 21st day of April, 1980, and designates the entire record as the record on appeal.

The defendant, Jackie Queen, through his attorney, certifies that he has ordered a copy of the transcript from the reporter.

/s/ John W. Settle
JOHN W. SETTLE
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Notice of Appeal on the State of Arkansas by delivering a copy to the Prosecuting Attorney's Office on the third floor of the Sebastian County Courthouse, on the 21st day of April, 1980.

/s/ John W. Settle
JOHN W. SETTLE

APPENDIX "D"

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT

STATE OF ARKANSAS PLAINTIFF

VS. NO. CR-1564

JACKIE QUEEN DEFENDANT

MOTION TO REDUCE SENTENCE

Comes now the defendant and for his Motion to Reduce Sentence alleges and states the following:

I.

That a hearing was held on a Petition to Revoke the suspended sentences of the defendant in the above-styled cases.

II.

That the Court denied the Petitions in No. CR-75-83, CR-1562 and CR-1565; and ordered the suspended sentence

in CR-1564 be set aside and sentenced defendant to ten years in the Department of Corrections; and further set aside the suspended sentence in No. CR-75-264 and sentenced defendant to five years in the Department of Corrections, and ordered that the sentences in CR-1564 and CR-75-264 should run concurrently.

III.

That this Court still retains jurisdiction of this matter.

IV.

That the evidence submitted by the State in support of the Petition to Revoke alleged only misdemeanor violations as a basis for revocation with the exception of the allegation that the defendant was a Felon in Possession of a Firearm.

V.

That there was no evidence that the defendant harmed any person physically, or took or damaged the property of any person, nor did the State make such allegations.

VI.

That the evidence does not justify such an extreme sentence, nor does the punishment fit the results of the defendant's acts.

VII.

That if the defendant is required to go to the Department of Corrections, he will most probably be required to serve more than half of the sentence before release.

WHEREFORE, defendant moves that the Court reduce his sentence and for all other relief to which he may be entitled.

/s/ John W. Settle
JOHN W. SETTLE
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the above Motion on the State of Arkansas by hand delivering a copy of same to the Prosecuting Attorney's Office, third floor, Sebastian County Courthouse, Fort Smith, Arkansas, on this 23rd day of April, 1980.

/s/ John W. Settle
JOHN W. SETTLE

Citation of Authority
Ark. Stat. Ann. Sections 41-1208, 41-1209

APPENDIX "E"

MR. SETTLE:

MR. SETTLE: Your Honor, I think Mr. Porter is misunderstanding my argument. I am saying that the initial revocation in 1974 was invalid; the way the Court set it up sets up the consecutive situation.

THE COURT: All right. On CR-1564 then I find there is enough evidence to set aside the suspended sentence, find the defendant guilty of Burglary and sentence him to ten (10) years in the Arkansas Department of Corrections.

On CR-1565 the Petition will not be granted; probation will remain in effect—that's ten years from 1974. Probation in CR-1565 will remain in effect until 1984.

On CR-75-264 I find there is enough evidence to set aside the suspended sentence and find—and sentence the Defendant to five (5) years in the Arkansas Department of Corrections, to run concurrently.

Appeal bond will be $15,000.

MR. SETTLE: Your Honor, I would ask the Court to reconsider that appeal bond. I know the appeal bond is high. I would also ask the Court to reconsider the amount of sentence. I feel in view of the amount of evidence presented that is an extremely stiff sentence.

THE COURT: Well, you have to consider all the circumstances and number of events and the fact that on two of these cases he was already on probation once in 1970; then they were set aside in 1974, so you have to take all those matters into consideration also.

MR. SETTLE: Your Honor, I would also ask the Court—at least state to the Court that I feel that the ten year suspended sentence in effect in CR-1565 again creates a suspended sentence situation like what had been concurrent suspended sentences.

THE COURT: I will reduce that appeal bond to $12,500. Let's make sure we are right here. In

CR-1562 the Petition is denied. In CR-1564 ten years, and CR-1565, suspended sentence remains in effect. In CR-75-83, deny the Petition. CR-75-264, five years concurrent. Appeal bond $12,500. Defendant will be given credit for his jail time.

Court is adjourned.

COURT ADJOURNED